No. 85-224

In The

Supreme Court of the United States

October Term, 1985

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, and ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, AND MANUEL FLORES, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1.

Whether "a reasonable attorney's fee" awarded under Section 1988 of Title 42 of the United States Code must bear some proportionality to the amount of the judgment obtained by the party seeking such fees in a case in which monetary relief only was pursued and/or obtained.

2.

Whether an award of attorney's fees under Section 1988 of Title 42 of the United States Code more than seven times the amount of a judgment obtained in a suit for monetary relief only constitutes an abuse of discretion by the trial court.

PARTIES INVOLVED

The following parties have an interest in the outcome of this case:

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, MANUEL FLORES, JR., Plaintiffs and Respondents;

ROY B. CAZARES, GERALD P. LOPEZ, Attorneys at Law;

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, ROBERT PLAIT, Defendants and Petitioners.

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OPINIONS AND JUDGMENTS BELOW

The June 27, 1985 opinion of the United States Court of Appeals for the Ninth Circuit, which herein is sought to be reviewed, appears in the Joint Appendix (hereafter, J.A.), at pp. 193-198 thereof. No rehearing was sought. The Ninth Circuit's opinion affirmed the second award of attorney's fees herein, made by the United States District Court for the Central District of California, as represented by its order and findings of fact and conclusions of law, both of June 26, 1984 (J.A. pp. 185-186 and 187-192).

The said June 26, 1984 award of attorney's fees followed this Honorable Court's prior grant of certiorari herein on May 31, 1983, reported at 461 U.S. 952, 103 S.Ct. 2421, which appears at J.A. p. 184. The said grant of certiorari by this Honorable Court also included an order vacating the District Court's initial award of attorney's fees, made on April 3, 1981, after which an unsuccessful appeal was taken by petitioners to the Ninth Circuit, which affirmed the District Court's first award of attorney's fees on June 15, 1982. The District Court's initial award of attorney's fees, as evidenced by its judgment and findings of fact and conclusions of law, appear at J.A. pp. 166-172 and 173-175. The opinion of the Ninth Circuit affirming said award, reported at 679 F.2d 795, appears at J.A. pp. 176-183.

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JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves § 1988 of Title 42 of the United States Code, which at the time of the trial herein, provided, in part, as follows:

> ". . . In any action or proceeding to enforce a provision of sections of 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The aforesaid statute was amended, effective October 1, 1981. The amendment, however, does not affect this case. Amended § 1988 now provides, in part, as follows:

> ". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of the United States Internal Revenue Code or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

On August 1, 1975, respondents were attending a large private party on the grounds of and in a home owned by two of the respondents in Riverside, California, when police officers entered, declared an unlawful assembly, forcibly broke up the party, and arrested many of the guests, including four of the respondents. The four respondents were arrested and later prosecuted, but the charges

against were dismissed for lack of probable cause. On June 4, 1976, all eight respondents filed suit against the City of Riverside, its chief of police, and thirty police officers, alleging violations of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, violations of 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986, and pendent state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, and negligence. Respondents sought compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees. In sum, the eight respondents herein presented separate claims against 32 defendants, for a total of 256 individual claims.

However, 17 of the defendant police officers were dismissed by the original trial judge after vigorously contested motions for summary judgment in January, 1978 (See Memorandum Opinion and Order and Judgment, J.A. pp. 7-13). In addition, five of the remaining six officers who moved for and were denied summary judgment, despite opposition from respondents, were found after trial to have no liability to any of the respondents on any theory whatsoever.

Prior to the trial, respondents dropped their requests for injunctive and declaratory relief, along with their original allegation that the police officers had acted with discriminatory intent. Thus, the trial went forward as a simple suit for monetary relief by the eight respondents herein, against the City of Riverside, the chief of police, and 14 of the remaining officers.

After a nine day trial, the jury returned a verdict exonerating another nine of the individual defendants from liability, and awarding $33,350 to respondents based on 11 violations of § 1983, four instances of false arrest and imprisonment, and 22 instances of common negligence. No single respondent achieved a jury award larger than $8,500. No individual defendant above the rank of lieutenant was found to have any liability to any of the respondents.

Respondents did not prevail on any of their remaining theories of liability, no restraining orders or injunctions were ever issued against any of the defendants, and the City of Riverside was not compelled to, and did not, change any of its practices or policies as a result of the suit.

On December 5, 1980, respondents filed a post-trial motion for attorney's fees pursuant to 42 U.S.C. § 1988. In responding thereto, petitioners objected to any fee award that was disproportionately large in comparison to the amount of the monetary judgment recovered (J.A. pp. 72-75). Petitioners were to repeat this argument unsuccessfully at every stage of the proceedings thereafter.

On April 3, 1981, the trial court awarded to respondents attorney's fees in the sum of $245,456.25. This award represented to the penny the amount of attorney's fees which the respondents had requested, less their out of pocket expenses, and without a multiplier, also requested.

Petitioners appealed the award, and on June 15, 1982, the Court of Appeals affirmed (*Rivera v. City of Riverside*, 679 F. 2d 795 (9th Cir. 1982); J.A. pp. 176-183), specifically rejecting petitioners' arguments regarding the

disproportionality between the amount of attorney's fees awarded and the jury verdict, stating that "[t]he extent to which a plaintiff has 'prevailed' is not necessarily reflected in the amount of the jury verdict." *(Rivera v. City of Riverside, supra,* 679 F. 2d at 797; J.A. p. 181) However, this Honorable Court granted certiorari, vacated the award of fees, and remanded the case for further action in light of *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983). *(City of Riverside v. Rivera,* 461 U.S. 952, 103 S.Ct. 2421 (1983); J.A. p. 184)

On remand, the District Court reinstated its previous award of attorney's fees in the same amount as before (J.A. pp. 185-192), and the same Court of Appeals panel which had heard the first appeal, once again affirmed the trial court's award of attorney's fees in the sum of $245,456.25 (J.A. pp. 193-198), specifically rejecting the need for any relationship between the amount of damages awarded to the prevailing party and the amount of attorney's fees awarded (J.A. p. 196).

Certiorari was granted by this Honorable Court on August 9, 1985.

SUMMARY OF ARGUMENT

In order to understand petitioners' claim that the award of attorney's fees in the sum of $245,456.25 was not "a reasonable attorney's fee" under § 1988 of title 42, a complete comprehension of the factual context in which the attorney's fees were made is mandated. This necessitates both a knowledge of what the instant case was about, as well as an understanding of what it was not about.

It was not a class action. Rather, eight individual plaintiffs sued for damages in their names alone, rather than in any representative capacity.

It was not a case which sought, at trial, injunctive, declaratory, or any other type of relief, other than money damages.

It was not an action in which the jury was asked to decide whether there had been any pattern or practices of discrimination by the municipal defendant, or by any of its employees. Such claims were dropped by respondents prior to trial.

It was not a case in which either the City of Riverside, or its police department, was compelled to, or did change any of its practices or policies.

It did not involve any evidence, at trial, of damages as a result of any physical injuries inflicted at the hands of any of the defendants.

It was not a lawsuit in which any police officer above the rank of lieutenant was found to have any liability to any of the respondents, although the chief of police was sued and forced to endure more than four years of litigation before being totally exonerated at trial.

In fact, with one glaring exception, this was not a case in which respondents, by any rational standard, achieved very much success. They brought a myriad of claims against 32 defendants, but were forced to drop many of these claims prior to trial. Ultimately, they were successful against only six of the 32 defendants sued, and on precious few of their original claims (see "Statement of the Case" herein). Furthermore, although they sought mil-

lions of dollars in damages, after nine days of trial, the jury valued all of respondents' claims—most of which were pendent state claims—at a grand total of $33,350, with no single respondent being awarded more than $8,500. Why was there such a disparity between the amount sought by respondents and the amount awarded by the jury? Because as the jury foreman, Renee Wong, said,

> "We wanted the Riveras to get something for putting up with the case for five years. But we didn't see any strong evidence to tell us to give them a whole lot of money, either." (J.A., p. 113)

In other words, having chosen to pursue this matter as one solely for money damages, respondents, in the eyes of the jury, failed to prove much of a case.

Still, the one glaring exception to respondents' lack of success herein was their achievement of an award of attorney's fees totally disproportionate to the judgment, *exceeding by more than seven times the sum awarded by the jury at trial.*

However, it was in this achievement that not only was the intent of Congress in enacting § 1988 badly twisted, but that the guidance given by this Court, in *Hensley, supra,* and in *Blum v. Stenson,* — U.S. —, 104 S.Ct. 1541 (1984), as well as the guidance of other courts, wholly ignored, as well.

The award of attorney's fees herein compensated respondents for every minute of every hour for which they sought compensation, with no reductions of their submitted time whatsoever.

It was an award which compensated them for claims on which they succeeded, as well as for those on which they did not succeed.

It was an award which paid two relatively novice attorneys the sum of $125 per hour for travel time, duplicated time, non-litigation time, pre-litigation time, post-litigation time, time spent litigating against defendants who were found to have no liability to any of their clients, as well as for time spent sitting in a hotel room.

It was an award made without the trial court having access to any time records prepared contemporaneously with the services for which respondents sought compensation.

It was an award made despite an almost total lack of "billing judgment" (*Hensley, supra,* 461 U.S. at 434, 103 S.Ct. at 1939-1940) having been exercised by respondents' attorneys.

It was an award made by the District Court in contravention of an order by this Honorable Court that the award of attorney's fees previously ordered herein be further considered in light of *Hensley, supra.*

It was an award which was neither proportionate to the amount received by the respondents at trial, nor reflective of the degree or nature of success achieved by respondents at trial.

And thus, for all these reasons, it was an award of attorney's fees which not only was not "reasonable," but, in addition, was one which constituted an abuse of discretion by the trial court, as well.

ARGUMENT

I. Awards Of Attorney's Fees Greatly Disproportionate To The Amounts Recovered In Cases Which Seek Only Monetary Relief Ignore The Purpose Of § 1988, Which Is To Provide Court Access For Litigants, Rather Than Windfall Fees For Their Attorneys

The award by the trial court herein of attorney's fees seven times in excess of the amount recovered by respondents at trial, in a case which sought monetary relief only, constitutes a total disregard of the stated purpose of Congress in enacting § 1988. Indeed, in its recent decision in *Hensley, supra,* this Court pointed out that § 1988 was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley, supra,* 461 U.S. at 429, 103 S.Ct. at (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). Providing access for litigants, however, is far different than providing a low risk opportunity for attorneys to greatly increase their incomes.

To its credit, Congress was aware of the potential for abuse that such a fee-shifting statute might engender. Thus, § 1988, as written and passed, provided only for "reasonable" attorney's fees. Such a fee standard was consistent with congressional intent that any attorney's fees to be awarded under § 1988 be "adequate to attract competent counsel," yet not so large as to "produce windfalls to attorneys." S.Rep. No. 94-1011, p. 6 (1976); see also H.R. Rep. No. 94-1558, p. 9 (1976).

While Congress did not provide the courts with any strict definition of what a "reasonable" fee was to be, it did, however, provide clear and useful guidelines to enable the district courts, which were to implement the statute,

to do so within the framework of a proper exercise of their discretion and consistent with congressional intent. Both the Senate and the House reports accompanying § 1988 refer the district courts to the twelve factors set forth in the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Use of the *Johnson* factors as a test for determining the proper measure of attorney's fees under § 1988 was expressly adopted by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). And as this Court noted in its *Hensley* decision, *supra*, one of the *Johnson* factors to be considered was "the amount involved and the results obtained." *Hensley, supra*, 461 U.S. at 430 n.3, 103 S.Ct. at 1937.

The importance of this particular factor in the mind of Congress is shown by the fact that the House Committee on the Judiciary chose specifically to highlight the "results obtained" test and four other *Johnson* factors which it considered to be the most critical of the twelve. These were: "the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any." H.R. Rep. No. 94-1558, p. 8 (1976).

Before continuing to discuss the "results obtained" factor, however, it is significant to note that with respect to the other four *Johnson* factors emphasized in the aforementioned House of Representatives report, that the trial court herein apparently ignored those, as well.

There was no evidence before the trial court of either "the customary fee for similar work," or of the customary

fee of respondents' counsel. The case presented no questions which were either novel, or particularly difficult, as evidenced by the fact that respondents prevailed, in addition to their § 1983 claim, only on pendent claims for negligence and false arrest and imprisonment. And, finally, the time records submitted by respondents speak for themselves as to whether the trial court considered the "time and labor required" to achieve a $33,350 jury award.

Respondents' attorneys' time records reflected that they spent 1,946.75 hours to recover $33,350, or an effective rate of little more than one attorney hour for every $17 returned to their clients by the jury. However, the trial judge awarded them attorney's fees of $125 for every hour they submitted, without any reduction to their total hours. In so doing, the trial court ignored both the language of § 1988, which provides only for a "reasonable" attorney's fee, as well as the direction of this Court, that any such fee-petitioners be required to exercise proper "billing judgment," saying:

> The district court should exclude from this initial fee calculation hours that were not "reasonably expended." (citations) Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obliged to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority."
>
> (*Hensley v. Eckerhart, supra,* 461 U.S. at 434, 103 S.Ct. at 1939-1940, quoting from *Copeland v. Marshall,* 641 F. 2d 880, 891 (D.C.Cir. 1980) (emphasis in the original))

In the instant matter, respondents' time records, upon which the District Court based its award of attorney's fees (J.A. pp. 44-62, 128-159), disclose the following:

1. Prelitigation time: 208.95 hours, for which respondents were awarded attorney's fees in the sum of $26,118.75;

2. Travel time (attorney Cazares only, as it is impossible to tell from attorney Lopez' submitted time records how much of his time was spent traveling from his original office in San Diego to court in Los Angeles, or to visit clients in Riverside): 110.05 hours, for which respondents were awarded attorney's fees in the sum of $13,756.25;

3. Conversations between the two attorneys: 197 hours, for which they were awarded attorney's fees in the sum of $24,625.00;

4. "Notes for Cazares," apparently being notes made by attorney Lopez for his co-counsel: 45.5 hours, for which respondents were awarded $5,687.50;

5. Preparation of a Pre-Trial Order (by Mr. Lopez): 143 hours, for which respondents were awarded $17,875.00;

6. Preparations of Jury Instructions (which were subsequently mostly discarded by the trial court): 59 hours, for which respondents were awarded, $7,355.00;

7. And, perhaps the most outrageous entry of all—"Stand-by Time"—that is, time spent by Mr. Cazares, who was then based in San Diego, to wait in a Los Angeles hotel room for a jury verdict to be rendered in Los Angeles. During this time, his co-counsel, Mr. Lopez, *was employed in Los Angeles*, at the University of California (U.C.L.A.),

less than 40 minutes' driving time from the federal courthouse. Mr. Lopez submitted no time for "standing-by." Mr. Cazares submitted 45.50 hours for "standing-by" for which respondents were awarded $5,687.50.

All told, the foregoing represents a total of 836.95 hours, for which respondents were awarded attorney's fees by the District Court at the requested, non-discounted rate of $125 per hour, for an award *for these items alone,* of $104,618.75, or more than three times the amount of the judgment herein. As one court faced with like overreaching recently commented:

> In determining what time is properly excludable, we follow the compelling guideline expressed in the legislative history of § 1988: the statute "may not be subverted into a ruse for producing 'windfalls' for attorneys."
>
> (*Henry v. First National Bank of Clarksdale,* 603 F. Supp. 658, 665 (N.D. Miss. 1984), quoting from *Dowdell v. City of Apopka,* 698 F.2d 1181, 1192 (11th Cir. 1983))

Clearly, however, the results of the fee award herein resulted in the kind of windfall to respondents' attorneys which would be difficult, if not impossible, to duplicate in private practice. In reflecting on such a happenstance, the Seventh Circuit noted:

> [W]hen a lawyer is working for his own client he sensibly limits his research and preparation in proportion to the magnitude of the results sought by his client and his client's perceived ability and willingness to pay. No such constraints work on a civil rights counsel. Indeed, the temptation is just the opposite. Since "the enemy" will be paying anyway, counsel is induced to read *every* case, depose *every* witness, examine fully *every* tactic, leave *no* stone unturned . . .

> (*Bonner v. Coughlin,* 657 F.2d 931, 935, (7th Cir. 1981), quoting from *Scott v. Bradley,* 455 F.Supp. 672, 675 (E.D. Va. 1978) (emphasis in the original))

The Seventh Circuit went on to say:

> As this court has recognized, the interest in promoting the redress of civil rights violations by awarding fees under the Act does not include the creation of "a civil rights fee bank to be liberally drawn upon by lawyers for their own welfare"
>
> (*Bonner v. Coughlin, supra,* 657 F.2d at 935, quoting from *Coop v. City of South Bend,* 635 F.2d 652, 655 7th Cir. 1980))

The result herein speaks not only to the "temptation" prophesied by the Seventh Circuit, but equally to the abuse of the trial court's discretion in making a fee award which not only was wholly lacking in "billing judgment," but, given the results obtained at trial, one which can hardly be seen as "reasonable," as contemplated by Congress in enacting § 1988.

This is especially so when the award is measured against the "results obtained" factor, mentioned in both *Johnson, supra,* and in the aforereferenced House report, and as reflected upon in numerous court decisions. Noting that the "nominal nature of the damages is a factor to be considered in determining the amount of the award," the Seventh Circuit has said:

> The amount recovered may sometimes indicate the reasonableness of the time spent to vindicate the right violated.
>
> (*Bonner v. Coughlin, supra,* 657 F.2d at 934, quoting from *Scott v. Bradley, supra,* 455 F.Supp. at 675)

That is not to say that respondents herein received only a "nominal" amount of damages, as that term is gen-

erally understood. Nevertheless, when measured against their total success, in view of the large number of parties sued and claims made (see "Statement of the Case," infra), as well as in terms of real dollar achievement, the results achieved by respondents are indeed nominal, even if the dollars recovered by them are somewhat greater. (It should also be pointed out that of the $33,350 achieved by the eight respondents, less than half that amount was awarded by the jury for violations of their civil rights. The remainder was for pendent state claims, the lion's share of which was for simple common law negligence. No single civil rights award against any of the six petitioners herein was in excess of $3,000. No one other than the eight respondents (and their attorneys) benefitted as a result of this case.) This is hardly the kind or degree of success which Congress contemplated as being the basis of a "reasonable" attorney's fee award of nearly a quarter of a million dollars. Such an award is, by definition, unreasonable, and not contemplated by § 1988.

However, petitioners do not mean to imply by the above that significant attorney's fees would be improper in cases involving class actions, injunctive, or some other form of non-monetary relief. Indeed, the congressional intent behind § 1988 is clearly otherwise (see S.Rep. No. 94-1011, p. 6 (1976) ("It is intended that the amount of fees . . . not be reduced because the rights involved may be non-pecuniary in nature."); H.R. Rep. No. 94-1588, p. 9 (1976). But, the within matter is hardly such a case. It was one for monetary relief only. As the Eighth Circuit recently noted in a case in which one of the issues under review was the disproportionality of the fee request (and award) to the results obtained:

> We note that this is a private interest case. The result does not benefit anyone other than the plaintiff. Although there are first amendment rights involved which are difficult to evaluate in monetary terms, we note the fee requested is egregiously disproportionate to the settlement obtained. This does not mean that a modest damage award or settlement should dictate the size of the attorney fee, but at the same time, it cannot be ignored. *We cannot help but note that the result achieved is far less than the remedy sought in the plaintiff's complaint.*
>
> (*Jacquette v. Black Hawk County, Iowa,* 710 F.2d 455, 461 (8th Cir. 1984) (emphasis added))

Herein, to the extent that respondents' complaint sought declaratory, injunctive, or other non-pecuniary relief, and to the extent that respondents ever attempted to state claims based on alleged patterns or practices of discrimination, these claims were either dropped prior to trial, or were totally without success at trial.

And yet, the trial court below awarded attorney's fees to respondents as if these claims had not been dropped, and as if the claims on which respondents failed, actually ended in success. Indeed, respondents were awarded attorney's fees at the rate of $125 per hour on each and every claim on which they did not succeed or pursue, against defendants who were adjudged to have no liability to any of them, and on theories of relief on which respondents did not recover. The "results obtained" by respondents, as a test of the amount of attorney's fees to be properly awarded under § 1988, were ignored by the District Court.

A glaring example of the foregoing is the compensation awarded to respondents as attorney's fees for their vigorously defending motions for summary judgment

brought by 23 of the defendants herein. Respondents' time records disclose that they spent 86.50 hours defending these motions, although they had precious little success in so doing. Seventeen of the 23 movants overcame the strict burden necessary to achieve summary judgment (J.A., pp. 7-13) and were dismissed from the action. Moreover, it is impossible to ascertain from respondents' time records (J.A., pp. 44-62, 128-159) how their time was apportioned among the 23 defendants seeking summary judgment. One thing, however, was clear: respondents achieved far less than total success in defending these motions, while billing more than two weeks' time in so doing.

But this fact never became a matter of inquiry (or, apparently, concern) to the District Court, which simply awarded to respondents as attorney's fees, the sum of $10,812.50 for defending, unsuccessfully, the motions for summary judgment. This sum represents full compensation to respondents' attorneys for *all* time spent opposing these motions (86.50 hours), at the requested rated of $125 per hour.

To put it simply: respondents were rewarded for trying mightily to keep in this action persons with respect to whom the original trial judge found, in granting summary judgment, there were no genuine issues of any fact, whatsoever.

Such a result is hardly one which Congress could have countenanced in passing § 1988. Indeed, such a result, like the totality of this fee award (given the nature of this action, and the results achieved thereby), grotesquely deforms the societal need which Congress sought to remedy

by facilitating access to the nation's courts for civil rights litigants. As Justice Rehnquist noted in his order of August 28, 1985, in which he stayed the mandate of the Ninth Circuit herein pending disposition for certiorari:

> . . . it is difficult for me to believe that Congress intended by § 1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plaintiff's attorney might himself have charged to the plaintiff in the absence of a fee-shifting statute. The billing experience I gained in 16 years of private practice strongly suggests to me that a very reasonable client might seriously question an attorney's bill of $245,000 for services which had resulted solely in a monetary award of less than $34,000. In this sense nearly all fees are to a certain extent "contingent," because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost in the event of success or failure. Nothing in the language of § 1988 or in the legsilative history set forth above satisfies me that Congress intended to dispense with this element of billing judgment when a court fixes attorney's fees pursuant to the statute.
>
> (Petitioners' Reply to Brief in Opposition to Petition for Certiorari, Appendix 1, pp. 15-17; *City of Riverside v. Rivera*, — U.S. —, 106 S.Ct. 5, 8-9 (1985))

II. The Abuse Of A Trial Court's Discretion In Making An Award Of Attorney's Fees Under § 1988 Is A Proper Ground For Vacating The Judgment

As this Court recognized in *Hensley, supra,* while a trial court has wide discretion in making an award of attorney's fees under § 1988, that discretion is not wholly unfettered, and must be exercised in light of the guidelines expressed therein.

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may reduce the award to account for the limited success. The court necessarily has the discretion in making the equitable judgment. This discretion however, must be exercised in light of the considerations we have identified.
>
> (*Hensley v. Eckerhart, supra,* 461 U.S. at 436-437, 103 S.Ct. at 1941)

The first of the "guidelines" discussed by this Court following the above quotation was that of "billing judgment." As already pointed out by petitioners, infra, respondents neither exercised proper "billing judgment" in their fee submission, nor were they required to do so by the trial court. Neither did the District Court "attempt to identify specific hours that should be eliminated." Rather, the District Court awarded to respondents attorney's fees at the hourly rate they requested, for the amount of time they requested. The trial court made no reductions from their submitted 1,946.75 hours—not even five minutes' worth.

Likewise, the District Court made no attempt to "reduce the award to account for the limited success." Rather, throwing reality to the winds, the District Court merely announced that respondents had achieved "total success" (J.A. p. 236), and that therefore, there was no need to reduce the award to account for the 26 defendants against whom respondents did not prevail, or the many claims fully (and expensively) litigated during the four years preceding trial, and either dropped by the respondents when the trial began, or rejected by the jury during trial.

Further, the District Court made no attempt to separate "hard" (litigation) time from "raw" (or non-litigation time, such as travel or "stand-by" time). On that matter, the Eleventh Circuit recently said:

> The district court must determine not just the actual hours expended by counsel, but which of these hours were reasonably expended in litigation. When scrutinizing the actual hours reported, the district court should distinguish "raw" time from "hard" or "billable" time to determine the number of hours reasonably expended.
>
> (*Ramos v. Lamm*, 713 F.2d 546, 553 (11th Cir. 1983))

The Eleventh Circuit added that:

> It does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended.
>
> (*Ramos v. Lamm, supra*, 713 F.2d at 553 (emphasis in the original))

In the instant matter, for example, attorney Lopez (according to the affidavit contained in his fee request, J.A. p. 31) was a virtual novice when the within litigation began. He submitted a tally of 143 hours for the preparation of a pretrial order and 59 hours for the preparation of jury instructions. For these efforts he was awarded $25,250 by the District Court (based on 202 hours at $125 per hour). As the Eleventh Circuit noted:

> In the instant case, for example, more than 100 hours were spent drafting the complaint. While this expenditure of time may have been reasonable, it demands an explanation.[3]
>
> 3. . . . If the inexperience of counsel requires the unusually large number of hours, the adversary should not be required to pay more than the normal time the task should have required.
>
> (*Ramos v. Lamm, supra*, 713 F.2d at 554)

On the matter of awarding travel time at the same rate as litigation time, as was done herein, the Eleventh Circuit said:

> However, because there is no need to employ counsel from outside the area in most cases, we do not think travel expenses for such counsel between their offices and the city in which the litigation is conducted should be reimbursed.
>
> (*Ramos v. Lamm, supra,* 713 F.2d at 559)

So, too, did the District Court err in not requiring time records from respondents which would have been sufficient to enable it to properly make an award under § 1988, let alone an award of the magnitude actually made.

Initially, respondents' time records submitted as part of their motion for attorney's fees under § 1988 (J.A. pp. 44-62, 128-159) contained not a word as to how they were prepared, when they were prepared, or what source material was used to prepare them. These things cannot be assumed, and it is respondents' burden to explain such matters. However, despite objection by petitioners, the District Court required no such explanation.

Mr. Lopez' first submission (J.A. pp. 61-65) was nothing more than a tabulation of hours, which described neither the activity, matter, or date on which the time for which he sought to be recompensed was performed. Eventually, both Mr. Lopez and Mr. Cazares filed time records from which it is difficult, if not impossible, to obtain any understanding as to what time was spent by respondents' attorneys on specific claims against specific defendants. Such records make any discussion, or review, of time spent on successful versus unsuccessful claims impossible. As the First Circuit explained in 1984 when it refused to

increase an award of attorney's fees, following a claim made under § 1988:

> The affidavit submitted by appellant's attorney, however, did not show how much of the time he spent on prevailing issues. We have repeatedly warned that "we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.
>
> (*Wojtkowski v. Cade,* 725 F.2d 127, 130 (1st Cir. 1984))

Then, in language which is equally applicable to the situation herein, the First Circuit commented:

> The affidavit here was little more than a tally of hours and tasks relative to the case as a whole. Attorneys who anticipate requesting their fees from the court would be well advised to maintain detailed, contemporaneous time records that will enable a later determination of the amount of time spent on particular issues. Cf. *Ramos v. Lamm,* 713 F.2d at 553 (requiring lawyers seeking a fee award under 42 U.S.C. § 1988 to maintain 'meticulous, contemporaneous time records'); *New York Association for Retarded Children v. Carey,* 711 F.2d 1136, 1147-48 (2d Cir. 1983) (announcing 'for the future' that 'contemporaneous time records are a prerequisite for attorney's fees in this circuit'); *National Association of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1327 (D.C. Cir. 1982) (warning that '[a]ttorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records.')
>
> (*Wojtkowski v. Cade, supra,* 725 F.2d at 130-131)

The foregoing decisions do nothing more than follow the language of this Court, in *Hensley, supra,* wherein it was stated that fee applicants:

> . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.
>
> (*Hensley v. Eckerhart, supra,* 461 U.S. at 424, 103 S.Ct. at 1941)

And yet, in spite of all the infirmities in respondents' fee petition, the District Court below awarded to respondents attorney's fees at the requested, non-discounted rate of $125 per hour for every hour they submitted. Such conduct by the trial court, flying as it does, in the face of all existing authority (not to mention the instructions from this Court that the prior award herein be reconsidered in light of the guidelines set forth in *Hensley, supra,* (J.A. p. 184), normally would be without any understanding.

Fortunately, the District Court has provided a key to understanding its conduct herein—conduct that began on the day the jury returned its verdict, and which continued through the remand by this Court of its first award of attorney's fees. In that respect, at least, the conduct of the District Court herein has been remarkably consistent throughout. It was going to do what it wanted to do (i.e., award huge sums of attorney's fees to respondents), regardless of the intent of Congress, regardless of the state of the law, and regardless of the instructions of this very Court.

On October 7, 1980, after the jury verdicts were read and the jury dismissed, and well before any motion for attorney's fees had been made by respondents, the District Court misinterpreted the fee award standard under § 1988 by telling respondents' counsel:

> All you have to do is submit to the Court what your hours are.
>
> (J.A., p. 201)

This invitation, and incorrect recitation of the legal standard for the award of attorney's fees, was followed up, a few moments later, with a statement by the trial court which was inexplicable, given the existing law regarding § 1988 fee awards, and especially since no motion for fees was then pending:

> My disposition now, so you will be aware of it, is that I would give Mr. Cazares the attorney's fees that cover *everything he did that's legitimate* so that the burden of the attorney's fees does not fall on the parties . . . And the final thing I say is that I have no quarrel with the quality of what he did. *So if I have no quarrel with the quality and he gives me the hours, I will compensate them. And you will have to tell me the rate.*
>
> (J.A., p. 203) (emphasis added)

The District Court was to make good on its word, and even after remand herein, it remained unphased by higher authority, saying at the hearing on the spreading of the mandate from the Ninth Circuit following the vacating of its fee award by this Court:

> [t]he United States Supreme Court is not saying, in sending the matter back, and the Ninth Circuit is not saying, in sending the matter back, that the award is wrong or not supported. It merely wants the Court to give it some more findings.
>
> (J.A., p. 225)

In other words, if the United States Supreme Court wanted "some more findings," more findings it was going to get, including those which could find no support from the record. There was to be no ". . . further consideration in light of *Hensley v. Eckerhart* . . ." (J.A., p. 184, *City of Riverside v. Rivera, supra,* 461 U.S. 952, 103 S.Ct. 2421), in spite of this Court's order to that effect.

Indeed, the District Court was quite straightforward regarding its lack of intention of reviewing the record to enable it to make a "further consideration." It had already made up its mind, saying *at the time of the spreading of the mandate:*

> I tell you now that I will not change the award. I will simply go back and be more specific about it.
>
> (J.A., p. 230)

With these words, the District Court made the previous remand by this Court nothing more than an academic exercise. No authority, judicial or otherwise, was going to sway the trial court from its previous award of attorney's fees.

And, that is exactly what transpired. No sums of attorney's fees were changed in any amount. There were to be no further affidavits explaining the proper rate of remuneration for attorneys handling cases of this type in southern California. There was to be no explanation of how the respondents' attorneys prepared their time records, when, or from what source documents. There was to be nothing explaining what time was spent on which claim against which defendants.

All that happened, *as the District Court had previously announced it would,* was that new findings were tailored to fit an old result.

In the process, the District Court abused its discretion by failing to follow the dictates of this Court in *Hensley, supra,* and, thereafter, by awarding to respondents attorney's fees which were on their face unreasonable. As such, the District Court abused its discretion, as well, by ignoring the intent of Congress and the language of § 1988. As the Ninth Circuit itself said long ago:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court.
>
> *(Delno v. Market St. Ry. Co.,* 124 F.2d 965, 967 (9th Cir. 1942))

———o———

CONCLUSION

As a result of decisions, such as that by the District Court herein, misinterpreting and/or misapplying the clear intent of Congress in enacting § 1988, an apparent growth industry has arisen among plaintiffs' lawyers across the country. Easily yielding to the "temptation" about which the Seventh Circuit was concerned in *Bonner v. Coughlin, supra,* 657 F.2d at 935, lawsuits of marginal worth are being filed so as to achieve the magical goal of "prevailing party" status under § 1988, and, thus, to open to these attorneys the coffers of defendant municipalities, states, and other governmental agencies.

Since all that is needed to achieve "prevailing party" status under § 1988 is success on one claim against one defendant, regardless of the number of claims sued upon or defendants litigated against, the burden of so doing isn't particularly difficult, nor is the attorney's risk of not being compensated therefor particularly great. Owing to the largess of many district courts, the goal of achieving huge awards of attorney's fees appears, not infrequently, to have subsumed the goal anticipated by Congress in the passage of § 1988, to wit: to provide a vehicle whereby civil rights litigants would be provided with court access

through the payment of attorney's fees "adequate to attract competent counsel," yet not so large as to "provide windfalls to attorneys." S.Rep. No. 94-1011, p. 6 (1976); see also H.R. Rep. No. 94-1558, p. 9 (1976).

As the Eighth Circuit reflected in approving the reduction of an attorney's fees request:

> The Attorney's Fees Awards Act should not serve as a vehicle to charge exorbitant fees and such excessive fees should not act to chill good faith defenses to claims brought under the Civil Rights Act.
>
> (*Jacquette v. Black Hawk County, Iowa, supra,* 710 F. 2d at 463)

But the result which the Eighth Circuit feared, has apparently come to pass. Cases are worked, churned, and litigated to achieve marginal success, at least from the standpoint of the plaintiff-client, with the full knowledge that riches, in the guise of "reasonable" attorney's fees, may be achieved thereby. Herein, respondents filed numerous claims against numerous defendants, prevailed on a very few of the claims, against a very few of the defendants, and, yet their attorneys were compensated for all time expended thereon. They were compensated for time spent litigating against defendants who had no liability to their clients. They were compensated for litigating theories they voluntarily abandoned at trial, after having spent enormous amounts of time on these theories for the previous four years. They were compensated for litigating theories which the jury found were without merit. And, as pointed out infra, they were compensated for defending against, and losing summary judgment motions brought by innocent parties who should never have been sued in the first place. They were even compensated for "standing-

by" in a hotel room, when co-counsel was less than three-quarter of an hour's drive from court. Here, as elsewhere, § 1988 had become the golden goose, and an end unto itself, rather than, as anticipated by Congress, a means to an end.

Apparently, for respondents, no claim was too tenuous not to pursue, nor was any defendant so potentially lacking in culpability, that fully litigating against such defendant was not the order of the day. Every minute of time that could conceivably be expended on this case, was so expended. After all, if successful as "prevailing parties," respondents bore none of the risk of having to pay for such overzealous lawyering, at least under the interpretation of § 1988 then prevalent in the Ninth Circuit.

Interestingly enough, the First Circuit has recently taken a different view; one that seems more in tune with the congressional intent of § 1988, and where, as here, involved a case in which fee petitioners were operating under the assumption that "the standard of service to be rendered and compensated is one of perfection, the best that illimitable expenditure of time can achieve." *Grendel's Den, Inc. v. Larkin,* 749 F.2d 945, 953 (1st Cir. 1984) Therein, the First Circuit correctly noted:

> [J]ust as a criminal defendant is entitled to a fair trial and not a perfect one, a litigant is entitled to attorney's fees under 42 U.S.C. § 1988 for an effective and completely competitive representation but not one of supererogation.
>
> (*Grendel's Den, Inc. v. Larkin, supra,* 749 F.2d at 953-954)

Not stated, either by the District Court in making its twin awards of attorney's fees herein, nor by the Ninth Circuit, in affirming same, is that no private client would

possibly accept an attorney's bill of $245,000 for achieving only $33,350 as being one that was "reasonable." That the District Court herein should have done otherwise only shows how far from the intent of Congress the trial court has strayed. It also shows why the award of attorney's fees herein should not only be vacated and remanded, but that this time, the remand be accompanied by specific instructions to *actually* engage in a reconsideration of the fee award herein consistent not only with this Court's decision in *Hensley v. Eckerhart, supra,* but with the intent of Congress, as well.

Respectfully submitted,

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